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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

COLUMBIA ARTISTS MANAGEMENT INC. and COMMUNITY CONCERTS, INC.,

Appellant,

against

UNITED STATES OF AMERICA, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF BY COLUMBIA IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM.

SEYMOUR D. LEWIS,
Attorney for Appellants,
575 Madison Avenue,
New York, N. Y. 10022.

Of Counsel:
ROSENMAN COLIN KAYE PETSCHEK & FREUND,
RALPH F. COLIN,
GILBERT S. EDELSON,
JOSEPH W. GELB,
575 Madison Avenue,
New York, N. Y. 10022

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The Government moves to affirm the District Court's action on the grounds that:

1. The Order of the District Court merely construed, and did not modify, the Consent Judgment (M. A. 5);*

2. Properly construed, the Consent Judgment (VI(D)) forbade the practice in issue, even assuming the District Court supposed it was modifying the judgment (M. A. 12); and

3. In any event, Columbia has "been deprived of no privilege" (M. A. 5) recognized by the Consent Judgment, and the issue is "unimportant," (M. A. 5) having "only a marginal significance" (M. A. 12).

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* "M. A." refers to the Government's Motion to Affirm.

As we shall show, the Government is in error on each of these points.

I. THE DISTRICT COURT MODIFIED—IT DID NOT MERELY CONSTRUE—THE CONSENT JUDGMENT.

A brief review of the record herein establishes:

1. The only issue tendered by the pleadings is the propriety under the judgment of the continued use by Columbia of the standard provision (quoted at pp. 3-4 *infra*) which provides in effect that a concert service must charge to the audience association the artist's established fee, unless the artist or his manager consents to a change;

2. An artist has an interest in providing his services at an established fee;*

3. The purpose of the standard provision was to protect this interest of the artist;

4. The use of the provision was compelled by Columbia's contract with the artists' union;**

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* This is to maintain the artist's prestige. Also, since artists perform before audience associations close to each other (Petition Par. 8), the practice avoids any claim of discrimination by an audience association. For example, if an audience association pays $1,000 for an artist and another pays $800, the association discriminated against may refuse to book the artist thereafter.

** Columbia so alleged in Par. 21 of its Petition, which Summy-Birchard denied for lack of knowledge or information. Columbia was prepared to prove at trial that this union contract was made in 1954, before entry of the instant decree. The provision therein which compels Columbia to use the standard provision in its contracts with concert services reads:

> "Every Artist's Management Contract shall specifically state the minimum fee or range of fees below which, during the term thereof, Manager may not offer the services of such Artist for any concert or Civic or Community type of engagements whatsoever except with the specific written consent of the Artist. Such minimum fees may be changed only with the written consent of the Artist." (American

(note cont'd on next pg.)

5. The Court understood that the sole issue was the propriety of the contract provision under the judgment; and

6. The Court found it sanctioned by the judgment, but modified the judgment to forbid its further use.

a. The Dispute Which Gave Rise to Columbia's Petition.*

Beginning on or about October 1, 1962, Summy-Birchard's Civic division offered to audience associations a new form of agreement known as the "selective plan". In substance, under the selective plan, Civic imposed a charge upon audience associations for the services of its field representatives. This practice of Summy-Birchard gave rise to the first dispute between Columbia and Summy-Birchard (Claim I of Columbia's Petition for Construction).

To protect the interest of the artist in providing his services at a uniform fee, Columbia on behalf of its artists has for many years used a form contract between it and each concert service acting on behalf of an audience association, providing in part as follows:

> "It is agreed that this contract for the appearance of (Name of Artist) is solely for the purposes

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Guild of Musical Artists, Inc. A. F. of L.—Managers Agreement, December 2, 1954.)

Thus the Government is plainly wrong when it argues that Columbia "has no power to assert whatever privilege may be possessed by the performing artist himself with respect to the charge to the audience." (M. A. 10) The union has imposed upon Columbia and other managers the duty of charging the audience association the artist's established fee. We shall show in Point III *infra* that the consent judgment embodies the idea that the manager is under a duty to protect the interest of the artist in obtaining his established fee for audience association and other engagements.

* The facts stated herein with respect to the origin of the dispute between Columbia and Summy-Birchard are alleged in Columbia's Petition and admitted in Summy-Birchard's Answer.

> of an engagement on the organized audience series in (Town) for (Dates) at the fee of $..... per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained from the artist or his manager will void this contract."

Columbia's listings set forth the artist's established fee.

Since at least 1954, Summy-Birchard, or its predecessor company, with respect to each artist managed by it, has also entered into contracts on behalf of its artists with concert services and others, containing the identical provision set forth above.

On January 2, 1963, Summy-Birchard's Civic division wrote to Columbia asserting that this provision is illegal as a violation of the Sherman Act (Ex. E to the Petition). Summy-Birchard further informed Columbia that this provision violated Paragraph VI (D) of the Consent Judgment (Petition Par. 26, admitted in Summy-Birchard Answer). On February 14, 1963, Summy-Birchard, still asserting the provision to be illegal, signed Columbia's form contract "under protest" (Exhibit F to the Petition).

b. The Petition of Columbia for Construction.

The Petition of Columbia set forth, *inter alia,* the above facts, which Summy-Birchard admitted in its Answer. In Claim I of its Petition, Columbia asked the District Court to construe the consent judgment to determine whether Summy-Birchard no longer qualified as a concert service within the meaning of the judgment, and, therefore, was not entitled to margin, because it did not furnish field agents without charge.

In Claim II, Columbia asked the Court to construe the judgment and adjudge that the above provision does not violate any provision of the Consent Judgment.*

c. Position of the Parties in the District Court.

After Summy-Birchard's Answer to Columbia's Petition for Construction, the Government filed its Memorandum, dated September 1963, in which it took the position that Columbia was correct in Claim I and that as to Claim II, the dispute was outside the scope of the consent judgment, and in any event, it presented no justiciable controversy between Columbia and Summy-Birchard. The Government therefore requested that Claim II be dismissed.

Thereafter, Columbia submitted a Memorandum to the District Court in support of its Petition for Construction. As to Claim II, Columbia contended that this issue was not only within the scope of the judgment, but went to its very heart. Columbia's Memorandum analyzed at great length the provisions of the judgment to show that it not only sanctioned, but required, that Columbia and Civic both continue to use the disputed contract provision and that unless the artist or his manager, pursuant to the standard provision, retained and exercised the privilege of determining the artist's fee to an audience association, the entire consent judgment became unworkable.

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* The prayer for relief on Claim II recites:

"That the Court issue an order construing the Final Judgment herein and providing that the provision in Columbia's contracts that each engagement before an audience association shall be performed at the artists' established fee for such engagement is not an illegal condition upon the artist's appearance, that such provision does not cause the artist to be unavailable to a concert service under Article VI(D) of the Final Judgment, and that the said provision does not violate Article VI(D) or any other provision of the Final Judgment."

Columbia contended finally, that only if the Court should be of the view that the dispute was outside the scope of the judgment, should it then, pursuant to the Declaratory Judgment Act, pass upon the validity of the provision under the antitrust laws.*

The Government never answered the elaborate arguments of Columbia that the consent judgment contemplated and sanctioned the use of this provision.

d. The District Court's Opinion.

In ruling in favor of Columbia on Claim I, the Court followed "the plain words of the decree" because, as the Court stated "they appear not to be inequitable or illegal" (J. S. A-7), and because "the decree does not in this area, necessarily conflict with the law" (J. S. A-8).**

The District Court, turning to Claim II, after defining the position of the parties, makes this initial statement:

> "The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer'—audience association, impressario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless. Since this court by its decree —albeit a consent order—has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system."

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* The Government agrees that Columbia's position was that the District Court should pass upon the validity of the provision under the antitrust laws only if it were to rule that the judgment does not sanction the standard provision of the contract (M. A. 4).

** As to Claim II, however, as we shall see, the Court found the decree conflicted with the law, and refused to follow—erroneously, we contend—"the plain words of the decree."

The Court then discussed the question of whether Summy-Birchard was seriously maintaining its contention that the contract was illegal, and finding that Summy-Birchard was so contending, the District Court elected to treat Summy-Birchard's Answer as a "petition for modification" (J. S. A-9, 10).

The Court then discussed Summy-Birchard's claim that the contested provision constitutes illegal price maintenance.*

The Court declared its intention to invalidate such part of the consent judgment as permitted Columbia to use the contested provision, in the following words:

> "Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid" (J. S. A-11).

The Court made it clear, however, that "invalidation of such part of the consent decree" did not affect its ruling on Claim I (J. S. A-11, 12).

The Government relies, as support for its view that the Court was merely construing the consent judgment, not modifying it, upon the fact that the Court, at the conclusion of its opinion states, "The request for a construction approving Columbia's contracts with concert services (Claim II) is denied" (M. A. 10). This statement proves no more than that, having determined that it must be modified, the District Court denied Columbia's request for a construction.

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* The District Court apparently concluded from *U. S.* v. *Swift & Co.*, 286 U. S. 106 (1932) that it had the power to modify the consent judgment to correct an error of law (J. S. A-9, n. 5). This was the critical mistake in the Court's reasoning.

e. The Motion for Reargument and the District Court's Opinion Thereon.

Columbia then moved for reargument and submitted its Memorandum of December 16, 1963 in support thereof. Columbia contended the Court lacked power under *U. S.* v. *Swift & Co.*, 286 U. S. 106 (1932) to invalidate that part of the judgment which sanctioned Columbia's use of the disputed provision. Columbia further argued that, assuming, *arguendo*, power to modify, the Court erred in ruling the contested provision illegal price maintenance, and that on the record, the legality under the antitrust laws of the contested provision was clearly established.*

The Government took no position on Columbia's motion for reargument. By opinion, dated January 14, 1954, Judge Tyler granted Columbia's motion for the purpose of determining whether an evidentiary hearing should be held on the question of whether Community Concerts (and presumably, therefore, all concert services) are agents of audience associations. This question would resolve the resale price maintenance question, since there can be no resale price maintenance if the artist or his manager controls the price at which the artist's performance is "sold" to the audience association.

A hearing was held before Judge Tyler on January 27, 1964, at which Government counsel failed to appear and at which counsel for Summy-Birchard stated that although he had not changed his position that the contested provision was illegal, he had not intended that the Court treat his answer to Columbia's petition as a petition for modification of the decree.

The Court set down another hearing at which it directed that Government counsel appear. On February 4, 1964,

* Columbia contended that if there were any factual issues with respect to whether the concert service was an agency of the audience association, as Columbia contended, there should be a hearing on this issue.

there was a further hearing at which the Government took the position that the Court should exercise jurisdiction under Claim II, and that it should reaffirm its original opinion. The Court on reargument adhered to its initial views.*

f. The Form of the Order.

The Government contends (M. A. 11) that the form of the order of the District Court "leaves the question open"

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* The Government relies on three sentences in the Court's opinion on reargument to support its position that this opinion establishes that the Court was merely "construing" and not "modifying" the judgment (M. A. 11).

(i) The Government states that in the opinion after reargument, the Court stated that in the first opinion it had merely refused to rule that Columbia's standard contract provision was proper under the decree (M. A. 11). The full sentence quoted by the Government in part and the sentence following read:

> "Second, Columbia urged the court to find and rule that a standard contract provision used by them in 'selling' performances to other concert services was proper under the decree. This the court refused to do in its same opinion of November 19."

These sentences do not prove that the District Court merely refused to find that Columbia's standard contract was proper under the consent judgment. The Court refused to do so because as it explained, the judgment thereby would have permitted illegal price fixing. Thus, the Court modified it to prevent continued price fixing under the judgment.

(ii) The second sentence relied upon by the Government (M. A. 11, J. S. A-19, n. 5) relates to the question of whether on the issue of the legality of the contested provision there should have been a hearing pursuant to the *White Motor* case. It does not bear in the slightest on the question whether the Court's opinion can be interpreted as a construction or modification.

(iii) The third sentence relied upon by the Government is the penultimate sentence of the opinion. The Government states that it "is at least susceptible of being read as an assertion that the court would not construe the consent decree as sanctioning a *per se* violation of the Sherman Act (J. S. A-20)." (M. A. 11). A reading of both opinions of the Court makes it plain that this penultimate sentence expresses the thought that although the contractual clause is in conformity with the consent judgment, the Court will not sanction it and therefore is modifying the judgment.

as to whether the Court construed or modified the Final Judgment.

The sequence of events leading to the formulation of the Final Order shows that the Court explicitly ruled that the consent judgment permitted use of the contested provision, but that Columbia would not, nevertheless, be allowed to rely upon the judgment and that the Court was modifying the judgment accordingly.*

After the District Court's opinion on reargument, the Government submitted its proposed form of decree. It contained only the first two sentences in Paragraph 2 of the Court's Final Order. Columbia then submitted its counter-proposed form decree which added the following sentence: "To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act."

In support of its counter-proposed decree, Columbia submitted a Memorandum which stated:

> "this Court has modified the Final Judgment by holding it to be in part illegal and void. Where a court modifies an outstanding decree, the order of the court should reflect that modification; this Court's order should show that the decree in this

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* Paragraph 2 of the Court's Final Order, which disposes of Claim II, reads as follows:

> "The Court has jurisdiction to determine the issues raised by Claim II. The provision in Columbia's contract (Petition, Exhibit D) that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. §1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid."

> case has been modified. It should be clear to the parties, to others in the industry and to the public that insofar as the decree clearly envisions that the artist or his manager will be able to control the ultimate price paid by the "consumer"—audience association, impressario, or whoever assumes the risk of "producing" a show . . .'. It is illegal and void.
>
> "While we adhere to the positions expressed in our Motion for Reargument, we submit that as a matter of basic fairness to all concerned, and to properly reflect its opinion in this case, the Court should include in its order the sentence which Columbia has suggested be added to the Government's proposed order."

The Government argued in its "Memorandum in Opposition to Columbia's Counter Order" that the additional sentence suggested by Columbia should not be included in the order because the Court did not "find a single word in the Final Judgment to be illegal and void" (p. 2) and that the Court found only the contested provision illegal.

The District Judge, in his Final Order, not only included the sentence suggested by Columbia in order to show that the consent judgment had been modified, but added in his own handwriting the following additional words:

> "and any continued reliance by Columbia upon such portion or portions of the Final judgment will not be construed by the Court to be in any way valid."

II. THERE WAS NO ISSUE NOR PROOF IN THE PROCEEDINGS BELOW OF ANY "ADDITIONAL REQUIREMENT."

The Government's motion to affirm is not based upon use of the standard contract provision by Columbia, but upon an alleged issue which was not part of the proceedings

below—an issue which originates from the imagination of Government counsel.

According to the Government, the issue below was not merely Columbia's use of the standard provision, but some "additional requirement". (M. A. 6) Thus, at the outset of its argument, the Government concedes that the consent judgment sanctioned the use of the disputed provision:

> "Appellant Columbia, as manager, thereafter refused to make artists available except under a standard form agreement. The agreement in effect required a concert service to charge the audience association (the 'consumer') the artist's 'established fee' and allowed the concert service the same 'margin' out of the fee enjoyed by appellant Community. Those terms were sanctioned by the decree." (M. A. 6)*

However, the Government's motion immediately adds:

> "Appellant Columbia also imposed as a condition of making an artist available the *additional requirement* that the concert service agree to retain the full margin for itself (J. S. A.-4, 5) instead of reducing the net cost to audience associations by rebating all or a part of the margin, as Summy-Birchard apparently was willing to do. When Summy-Birchard challenged the legality of *this additional requirement*, appellants instituted the present proceeding seeking a judicial determination: (1) that its practice not only did not violate but was affirmatively sanctioned by the consent judgment, and alternatively (2) that the practice, if not affected by the decree, was nevertheless lawful." (M. A. 6) (Emphasis supplied.)

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* In fact, the standard provision is not as strict as the Government states. It requires a concert service to charge the audience association the artist's "established fee" only if either the artist or his manager will not consent to a change in the fee.

This "additional requirement" is a myth. The sole act of Summy-Birchard was to object to signing the standard contract, which it finally did "under protest." Columbia imposed nothing more on Summy-Birchard than its standard agreement.

In its brief, the Government assumes that this record establishes that this "additional requirement" of Columbia had the purpose and necessary effect of (a) compelling the unaffiliated "concert service . . . to retain the full margin" (M. A. 6, see also 12) and (b) preventing such a service from accepting "a lower net return than the affiliated service" (M. A. 8). But there was no trial below, and no such findings were made.

Nor can such findings be supplied by inference from the mere use of the standard provision. Under that provision a concert service may, from moneys received as margin or from its capital and surplus, compete for audience associations by outright grants of money, loans, or supplying more than customary services. The standard contract provision merely prevents the concert service, in *the case of each individual artist,* from charging less to the audience association than the artist's established fee.

III. THE CONSENT JUDGMENT CANNOT BE REASONABLY CONSTRUED TO FORBID THE USE OF THE STANDARD PROVISION.

We have shown in I, *supra,* that the Court construed the consent judgment to authorize the standard provision, but modified it to forbid its further use. The Government apparently contends that this Court may uphold the ruling, if not the reasoning, of the District Court by a construction of the judgment which forbids the use of Columbia's standard provision (M. A. 12).

It is not clear whether the Government is arguing that the construction it contends for relates to the standard provision, or to the mythical "additional requirement" Columbia is alleged to have imposed. Since there was in fact no such "additional requirement", we will show here that the judgment cannot reasonably be construed to forbid the use of the standard provision; on the contrary, a fair construction of the judgment would lead to the conclusion that Columbia was under a duty to continue to use the standard provision to carry out its duties under the judgment.

The concept of an artist's "established fee" was woven into the entire fabric of the consent judgment. Paragraph II (J) defines "margin" to mean "the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience associations". Reference to the artist's "established fee" also appears in Paragraphs V(D)(3) and VI(C). Paragraph V refers to "the artist's established audience association fee".*

Paragraphs V(A) and (B) compel Civic and Community to furnish to audience associations organized by them the established audience association fee of any artist as determined *by the artist's manager*.** Civic and Community have no right, under the judgment, to inform the audience asso-

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* It will be recalled that in 1954, the year before entry of the consent judgment, the artists' union had imposed the obligation upon Columbia and other managers to charge the artist's established fee for all engagements, except when the artist consented otherwise. See Petition for Construction Par. 21.

** The Final Judgment contains not only the usual provisions enjoining the defendants from allegedly illegal practices but also imposes upon the defendants a series of affirmative duties to carry out the stated purposes of the decree. (Pars. V, VI and VII.) Thus, Paragraph V imposes duties upon Community and Civic which enable all managers to compete for engagements for their

(note cont'd on next pg.)

ciations organized by them that the established fee is anything other than that set by the artist's manager. Indeed, it would be a violation of the judgment for Community or Civic to inform their audience associations that an artist's established fee is other than the fee specified by the manager (Par. V(B)).

The consent judgment could not have been intended, on the one hand, to permit independent managers to furnish, through Civic and Community as intermediaries, the established fee and all other pertinent information about their artists to audience associations organized by Community and Civic, and on the other, to permit Community and Civic to vary those prices at will. Moreover, if the construction urged by the Government is correct, any concert service could vary the prices charged to audience associations organized by it, and within a short time an artist would not have any established audience association fee. Thus the privilege granted to all managers competing with Columbia or Summy-Birchard to furnish to all audience associations organized by Civic and Community the established fees of their artists would be thwarted—and more specifically, Columbia's right to compel Civic to furnish to

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artists before audience associations organized by either Community or Civic.

The machinery used by Paragraph V to accomplish this is to compel Community and Civic:

1. To make it known by advertisements that they will furnish to audience associations organized by them information supplied to them by any manager with respect to the availability and established audience association fee of any artist, provided the artist agrees to allow to Community and Civic a margin equal to the customary margin allowed to them by other artists with comparable fees;

2. To furnish such information to each audience association;

3. To make available to any manager certain information with respect to the audience associations organized by them; and

4. To use their best efforts to obtain any artist selected by an association organized by them.

all Civic's audience associations the established fees of Columbia artists.

Paragraph V(D) provides that Community and Civic must maintain and make available for inspection records as to each audience association organized by them to any manager who agrees, *inter alia*, to advise these defendants, prior to offering his artists to any audience association organized or maintained by Community or Civic at a fee less than that artist's established fee, that Community or Civic, as the case may be, is also authorized to offer such artist at the lower fee.

Simply stated, Paragraph V(D) provides for the following situation:

1. A manager of an artist desires to inspect the records of Community or Civic with respect to the audience associations organized by them;

2. The manager files an undertaking pursuant to Paragraph V(D) of the Decree, which then qualifies him to obtain these records;

3. The manager then obtains information with respect to the audience associations organized by Community and Civic;

4. The manager then goes directly to one of such audience associations and offers his artist at a fee below the established fee of the artist; and

5. In such event, Paragraph V(D)(3) permits Community or Civic, as the case may be, to offer the same artist to the same audience association at the lower fee offered by the manager, and still retain margin.

Clearly the above provision assumes that it is the manager who has the privilege of determining the fee to be paid

by the audience association, and that Community or Civic do *not* have the right to offer an artist at less than the artist's established fee—except where the manager, under the above circumstances, himself changes his artist's established fee by offering him to the audience association at less than his established fee.

Nothing could be clearer than that the consent judgment confers upon Civic and Community the privilege of varying the artist's established fee in *this one situation only*. If the Government's contention is correct—that Civic and any other concert service at all times can charge any price it may please to the audience association—this privilege of meeting the manager's lower price, conferred by the express language of the judgment upon Civic (and Community), is wholly gratuitous.

Paragraph VI(A) is also crystal clear on the question of who determines the fee to be charged to the audience association. That paragraph enjoins each defendant from "refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee *charged by such artist to comparable audience associations* where the artist is reasonably available for the desired performance." (Emphasis supplied.) In short, in the words of the judgment, the fee to audience associations is "charged by such artist",* not by a concert service.

Moreover, under Paragraph VI(A), if Columbia makes an artist managed by it generally available to audience associations organized by Community at let us say, $500, it must also make that same artist, if "reasonably avail-

* In some places the judgment assumes that the manager determines the fee, in others the artist. The judgment obviously regards this as immaterial, since the manager must charge the artist's established fee, except when the artist consents otherwise. See note, p. 14, *supra*.

able for the desired performance", available at the same price to an audience association organized by Civic or to any other financially responsible audience association. The purpose of Paragraph VI(A) is to give an audience association the right to obtain artists at the same fee paid by comparable audience associations. If a concert service is free to charge such price to its audience associations as it, and not the artist or his manager, determines, the right of the audience association to equal treatment is lost.

Paragraph VI(C) enjoins each defendant from:

> "Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;"

Thus the consent judgment recognizes clearly the power of the manager to determine the artist's established fee, but forbids one possible misuse of such power, namely, charging "less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant".

In sum, the construction urged by the Government:

1. Withdraws the privilege given by the consent judgment, directly and by implication, to all artists and managers, to determine the established fees for audience association engagements (Pars. II(J), V(A), V(D), VI(A), VI(C));

2. Curtails the privilege given to all managers by Pars. V(A) and (B) to compel Community and Civic to furnish information as to the artist's established fee to all audience associations organized by Community or Civic;

3. Specifically, deprives Columbia of the privilege given to it to compel Civic to furnish to audience associations its artists' established fees (Pars. V(A) and (B));

4. Makes a part of the decree surplusage (Par. V(D)(8)); and

5. Takes away the right of all audience associations to equal treatment in the matter of artists' fees (Par. VI (A)).

The District Court's modification, which the Government seeks to sustain by its theory of "construction," has made the decree a shambles.

What are the Government's contentions which can be weighed against this array of evidence that use of the standard provision was built into the judgment as a means of carrying out its purposes?

The premise of the Government's arguments is that "the aim of the decree was to open up to others all aspects of the business of arranging concerts by performing artists through audience associations". (M. A. 7) Here, again, the Government has conjured up a fact unsupported by the record; this is a blatant misstatement of the aim of the consent judgment. The judgment states its own purpose (Par. VII):

> "It being the purpose of this Final Judgment to facilitate and increase the booking of independently managed artists by audience associations organized or maintained by any of the defendants and to promote competition between defendants and between and among independent managers and defendants in the management of artists . . ." (J. S. A-28)

Once the true purpose of the judgment is understood—to increase the bookings of independently managed artists, and to promote the competition of independent managers with defendants—the judgment's sanction of the use of the standard provision becomes clear. All artists and managers, including the independents, were to continue to enjoy

the long-standing privilege of controlling their artists' fees to audience associations and to others; independent managers were to have the additional privilege of compelling defendants Community and Civic to make known to their organized audiences the established fees of the independents' artists (Par. V), which the independent managers would control. The last thing contemplated by the judgment was to take from the independent manager the privilege of determining his artists' fees to the audience associations organized by defendants Community and Civic and give this privilege to defendants Community and Civic—yet this is exactly what the construction claimed by the Government (and the Court's modification) accomplishes.

Continuing its recital of imaginary purposes of the judgment, the Government then states that another of its purposes "was to bar the appellants from discriminating in setting the fees and margins for particular concerts in such a way as to preserve their monopolistic position and defeat the purpose of opening up the business to others". (M. A. 7) The Government further states that the draftsmen of the decree "were concentrating on preventing discrimination against unaffiliated concert services" (M. A. 8). Of course, the decree "was concentrating" on no such thing (Par. VII).

Reasoning from the foregoing concocted purposes of the consent judgment, the Government argues that there was "little reason to be thinking of what the unaffiliated service might do with its margin or the possibility that the unaffiliated service would be willing to accept a lower net return than the affiliated service." (M. A. 8)

Here the Government substitutes for the plain words of the judgment its speculation as to what was in the minds

of the draftsmen based upon its prior erroneous assumptions of the judgment's purposes. In any event, as we have shown in Point II *supra*, this argues a non-existent issue.

The next argument of the Government relies on Par. VI(A) of the decree (M. A. 8). That paragraph compels Columbia and Summy-Birchard to make each artist available to all audience associations at the same fee charged by each artist to comparable audience associations. As stated, *supra*, p. 17, this provision of the judgment clearly contemplated that the fee to the audience association would be one "charged by the artist" and not charged by a concert service.

The last argument made by the Government is that "in any event, what the unaffiliated service does with its margin once received is obviously irrelevant to any of the problems of opening up the business and preventing discrimination. They are the problems with which the consent judgment is concerned." (M. A. 8) But the problems with which the consent judgment was concerned were to increase bookings of artists managed by independents in towns organized by Community and Civic. It was intended, to that end, to leave control of the artists' fees to the audience association in the hands of the artist or his manager, not the defendants. This is particularly demonstrated by Par. V(D) which authorizes Community and Civic to offer an independent artist to its organized audience associations at a fee less than the artist's established fee *only to meet the lower fee offered by the independent manager.* (Emphasis supplied.)

To sustain its "construction", the Government relies essentially on a double invention—the "additional requirement" issue never presented to the District Court and the invention of a new set of judgment "purposes". It may well be that upon reconsideration the Government

now prefers a consent judgment of different purposes and means. The judgment as agreed upon by the parties, however, permits no reasonable interpretation other than that the standard provision was sanctioned, indeed, its use was compelled by the judgment as part of the machinery of carrying out its stated purposes.

IV. THE QUESTIONS RAISED ON APPEAL ARE IMPORTANT AND SUBSTANTIAL.

Unless this Court expunges the District Court's modification of the judgment, and directs it to enter an order to the effect that the contested provision is sanctioned by the consent judgment:

1. The decree below becomes unworkable;

2. Columbia is put in peril of contempt (J. S. 14-15);

3. Columbia is deprived of the privilege sanctioned by the judgment of using its standard contract provision;

4. Columbia is deprived of the privilege of compelling Civic to furnish to its audience associations the established fees of Columbia's artists; and

5. A long-standing industry practice, compelled by the concert artists' union before entry of this decree, is held to constitute resale price maintenance without any trial.

Conclusion.

Columbia asked the District Court to approve its use of the contested provision. The Government now agrees that the consent judgment sanctioned its use (M. A. 6). Unless the Government can find in this record that Columbia imposed some "additional requirement" which would warrant modification of the decree—and there is none—the Government itself should ask this Court to remand

to the District Court with instructions to vacate the existing order, and enter one construing the decree to permit Columbia to use the contested provision.

Respectfully submitted,

Seymour D. Lewis
575 Madison Avenue
New York, N. Y. 10022

Of Counsel:

Rosenman Colin Kaye Petschek & Freund,
Ralph F. Colin,
Gilbert S. Edelson,
Joseph W. Gelb,
575 Madison Avenue,
New York, N. Y. 10022.